

ARTICLES

CONSTITUTIONAL LAW AND RHETORIC

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ABSTRACT

What are the legitimate types of argument in constitutional debate? This is a perennial question in American law and every generation of constitutional scholars has the right to ask it anew. For over thirty years, Phillip Bobbitt's taxonomy of legitimate constitutional argument types has reigned as the most influential and enduring in the scholarly discourse. In a recent article, Jamal Greene has proposed a welcome but flawed rhetorical re-conception of Bobbitt's venerable typology. By identifying and correcting the errors in Greene's framework, this Article provides a rigorous theoretical grounding for the entire constitutional law and rhetoric project.

When properly grounded, constitutional law and rhetoric reveals how proof and persuasion operate in constitutional argument. The rhetorical perspective recognizes that our deepest constitutional disputes turn on value argument. Acknowledging value argument as a legitimate part of constitutional discourse in turn promotes rational discussion of the hard choices inherent in the Court's most vexing cases. A fully developed constitutional law and rhetoric framework thus helps us assess these vexing cases and confront what we really fight about when we fight about the Constitution.

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INTRODUCTION

What are the legitimate types of argument in constitutional debate? This is a perennial question in American law and every generation of constitutional scholars has the right to ask it anew. For over thirty years, Phillip Bobbitt's taxonomy of legitimate constitutional argument types has reigned as the most influential and enduring in the scholarly discourse.¹ In his recent article *Pathetic Argument in Constitutional Law*, Jamal Greene has proposed a rhetorical re-conception of Bobbitt's venerable typology.² Though Greene's rhetorical turn is welcome, his new typology is flawed. By identifying and correcting three critical errors in Greene's framework, this Article provides a rigorous theoretical grounding for the entire constitutional law and rhetoric project.

The first error identified is one of omission.³ Greene introduces a new rhetorical dimension to Bobbitt's typology but fails to challenge Bobbitt's propositional account of constitutional argument—the view that legitimate debate is solely confined to propositions about what the constitution means.⁴ Rhetoric comprehends the situation differently. Constitutional debates may involve appeals to reason (*logos*), authority (*ethos*), and/or emotion (*pathos*). While appeals to *logos* and *ethos* attack or defend specific propositions about constitutional meaning, appeals to *pathos* may directly support judgments about

¹ See generally PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION*, at xi-xii (1982) [hereinafter, BOBBITT, *CONSTITUTIONAL FATE*]; PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION*, at vii-viii (1991) [hereinafter BOBBITT, *CONSTITUTIONAL INTERPRETATION*]; Philip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233 (1989). Literally hundreds of law review articles have referenced Bobbitt's taxonomy over the years, and two recent cites confirm its enduring influence. See, e.g., Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U. CHI. L. REV. 575, 579 n.11 (2013); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 460, n.n.22 & 24 (2013).

² See generally Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389 (2013). It bears emphasis that the word "pathetic" in Greene's title is actually the adjectival form of the Greek rhetorical word/concept "*pathos*." Greene might have alternatively entitled his piece, *Pathos-Based Argument in Constitutional Law*.

³ This paragraph describes the argument advanced in Part III *infra*.

⁴ We might characterize the propositional account as stating that legitimate constitutional arguments *must always* take this form: *Proposition P (about the Constitution) is true because* [constitutional argument].

outcomes—who wins or loses particular cases. Such emotion-based judgments may derive from intuitive notions of right or wrong rather than from articulated propositions about constitutional meaning.⁵ Though Greene defends the legitimacy of pathetic argument in constitutional law, he fails to defend the legitimacy of non-propositional argument. This Article fills that gap.

The second error corrected is taxonomic.⁶ Greene usefully distinguishes between the subjects of constitutional argument (e.g., text, history, doctrine, etc.) and modes of persuasion in argument (i.e., *logos*, *ethos*, and *pathos*). However, Greene uses inconsistent terminology to describe this key distinction. This Article clears up potential confusion by introducing two time-tested rhetorical terms. Subjects of constitutional argument are identified as rhetorical *topoi*, while modes of persuasion are described as rhetorical *pisteis*. On-the-ground constitutional argument is then conceptualized as the intersection of *topoi* and *pisteis*—the union of content and form. This vocabulary not only brings theoretical precision, but it also helps explain Bobbitt's long misunderstood notion of "modality."

The third error identified has the most significance for general theories of constitutional adjudication.⁷ Greene consciously omits Bobbitt's prior category of "ethical" argument from his new typology. This effectively removes "value argument" from the list of legitimate subjects of constitutional argument. This Article characterizes this move as descriptively and normatively flawed. Some of our society's most profound constitutional disputes implicate deep and conflicting values. Advocates can and should appeal to those values in framing their constitutional arguments. If we wish to honestly confront what we really fight about when we fight about the Constitution, value argument needs to be restored to our constitutional law and rhetorical typology.

Once these three basic errors are corrected, the constitutional law and rhetoric project will stand on stronger theoretical footing. Readers will understand the rhetorical nature of constitutional discourse and how proof and persuasion operate in constitutional argument. Such, at least, is this Article's ambition. Now comes the roadmap:

Part I sets the scene by describing Bobbitt's basic typology and Greene's proposed rhetorical modification. Part II identifies the

5 We might characterize the non-propositional account as stating that legitimate constitutional argument *may* take this form: *Litigant L wins (the instant constitutional controversy) because* [constitutional argument].

6 This paragraph describes the argument advanced in Part IV *infra*.

7 This paragraph describes the argument advanced in Part V *infra*.

challenge this modified typology poses to the standard propositional account of constitutional argument and defends its legitimacy. Part III introduces the terms *topoi* and *pisteis* to clarify the distinction between constitutional subjects of argument and modes of persuasion.

Part IV is the longest and most important Part. It makes the case that value argument belongs in the constitutional law and rhetoric typology and includes a novel analysis of the nature of rhetorical *ethos*. It also illustrates how the theoretical constructs described in the Article apply to explain three key cases from First and Fourth Amendment doctrine.

I. ARGUMENT TYPOLOGY AND RHETORIC

Philip Bobbitt originally conceived his now-famous argument typology as part of an effort to account for the legitimacy of judicial review of constitutional questions by the Supreme Court.⁸ Previous scholars had wrestled with the democratic problem inherent in judicial review⁹ by advancing various arguments about the Constitution that all purported to legitimize review.¹⁰ On Bobbitt's view, these scholarly debates could never "establish independent legitimacy for judicial review" because they were "conducted by means of arguments that themselves reflect[ed] a commitment to such legitimacy."¹¹ In essence, Bobbitt identified constitutional argument as a self-contained and self-referential discourse that necessarily *assumed* the legitimacy of judicial review.¹²

8 See generally BOBBITT, CONSTITUTIONAL FATE, *supra* note 1, at 3–8.

9 Alexander Bickel memorably dubbed this democratic problem "[t]he [c]ounter-[m]ajoritarian [d]ifficulty." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1986).

10 BOBBITT, CONSTITUTIONAL FATE, *supra* note 1, at 3–5 (describing typical arguments in favor of judicial review).

11 *Id.* at 5.

12 The notion that a discourse cannot provide independent grounds for its own legitimacy has numerous philosophical parallels. H.L.A. Hart, for example, analyzed the "rule of recognition" that provides for the means of recognizing what counts as valid "law" in a legal system. See generally H.L.A. HART, THE CONCEPT OF LAW 100–10 (2d ed. 1994). Hart recognized that system's "ultimate" rule of recognition cannot validate itself, *id.* at 102, explaining that unlike regular rules of recognition, "there is no rule providing criteria for the assessment of [the ultimate rule's] own legal validity." *Id.* at 104. Rather, legitimacy of the ultimate rule is a social fact accepted by those that participate in the discourse. *Id.* at 108. Thomas Kuhn's renowned "paradigms" of scientific thought demonstrate a similarly self-referential and self-legitimizing concept. See THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 94 (2d ed. 1970) ("[I]n paradigm choice[,] there is no standard higher than the assent of the relevant community.").

Since constitutional argument could never provide an external justification for its own legitimacy, Bobbitt proposed instead to look inward. He aimed to understand the “legal grammar that we all share and that we have all mastered prior to our being able to ask what the reasons are for a court having power to review legislation.”¹³ The core elements of this legal grammar, on Bobbitt’s view, are the six archetypes of constitutional argument.¹⁴ The specific six archetypes are historical, textual, structural, doctrinal, ethical, and prudential.¹⁵

Participants in constitutional discourse “maintain[] the legitimacy of judicial review” through the continuous practice of archetypical arguing.¹⁶ At bottom, Bobbitt conceptualized “[j]udicial review [as] a practice by which constitutional legitimacy is assured, not endowed.”¹⁷ Though this conception of judicial review is not universally accepted, constitutional law scholars continue to embrace the argument typology forged from Bobbitt’s Wittgensteinian theory.¹⁸ Bobbitt’s typology has endured for more than thirty years.

Enter Jamal Greene. Greene argues that Bobbitt has failed to recognize a critical distinction between the “subjects of [constitutional] argument” and the “forms of rhetoric” that animate those arguments.¹⁹ Drawing on Aristotle, Greene then identifies the three an-

13 BOBBITT, *CONSTITUTIONAL FATE*, *supra* note 1, at 6.

14 Somewhat oddly, Bobbitt’s introduction in *Constitutional Fate* puts the number of archetypes at five. *See id.* at 7. Later in the book, he introduces ethical argument as a more controversial type. *Id.* at 93. By the book’s end, and in future work, Bobbitt confidently puts the number of arguments at six. *See id.* at 246; *see also* BOBBITT, *CONSTITUTIONAL INTERPRETATION*, *supra* note 1, at xi (discussing his “description of the six modalities”).

15 *See* BOBBITT, *CONSTITUTIONAL FATE*, *supra* note 1, at 3–119; BOBBITT, *CONSTITUTIONAL INTERPRETATION*, *supra* note 1, at 12–13. Critically, Bobbitt refers to these six argument types as “constitutional modalities.” *Id.* at 12. The meaning of “modality” has divided critics; this Article brings new perspective on its meaning by applying a rhetorical lens. *See infra* Part III.

16 BOBBITT, *CONSTITUTIONAL INTERPRETATION*, *supra* note 1, at 8. Though they can maintain legitimacy, none of the arguments “taken singly or together, justify judicial review.” *Id.* at 8–9.

17 *Id.* at 9.

18 Bobbitt explicitly identifies his understanding of “the process of legal argument” with Wittgenstein. *See* BOBBITT, *CONSTITUTIONAL FATE*, *supra* note 1, at 123, 266 n.1. I count myself among those persuaded that judicial review and constitutional argument are usefully understood as “language games”; *cf.* LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* pt. I, § 23 (G.E.M. Anscombe trans., 2d ed. 1958) (“[T]he term ‘*language-game*’ is meant to bring into prominence the fact that the *speaking* of language is part of an activity, or of a form of life.”).

19 Greene, *supra* note 2, at 1394. Though Greene focuses on Bobbitt, he aims his critique more generally at all “[t]axonomists of constitutional argument.” *Id.* at 1391. Richard Fallon is probably the second-most widely known constitutional argument taxonomist. *See*

cient “forms of rhetoric” as *logos*, *ethos*, and *pathos*.²⁰ He finally proposes that constitutional arguments should be classified on a two-dimensional grid instead of in Bobbitt’s one-dimensional list of archetypes. One axis of Greene’s new grid features five (not six) of Bobbitt’s subjects of constitutional argument; the other axis features *logos*, *ethos*, and *pathos*.²¹ Reading the two axes of the grid together shows how “each form [of rhetoric] may be used to modify a particular subject of constitutional argument.”²²

The genius of Greene’s schema lies in its systematic coupling of constitutional law and rhetoric. Constitutional scholars have long contested “whether constitutional law is a specialized discourse or is instead continuous with other practical forms.”²³ By turning to ancient rhetoric, Greene cuts through this intractable jurisprudential debate. His grid illustrates just how constitutional arguments can revolve around specialized subjects while simultaneously deploying modes of persuasion common to all practical argument. In the adjudicative context, “a judge may seek to persuade the audience as to the substance or valence of arguments from history, text, structure, precedent, and consequences through any of the three modes of persuasion [i.e. *logos*, *ethos*, and *pathos*].”²⁴

Greene’s insight helps bridge a gap that has unnecessarily divided the study of law and rhetoric from mainstream constitutional scholarship.²⁵ Rhetoric provides a lens for viewing constitutional argument

id. at 1393, n.14 (citing Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194 (1987)).

20 *Greene, supra* note 2, at 1394–95. *See also id.* at 1391 n.1 (citing ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE (George A. Kennedy trans., Oxford Univ. Press 1991)). *Greene* also describes *logos*, *ethos*, and *pathos* as “mode[s] of persuasion.” *Id.* at 1394. For an explanation of the terms *logos*, *ethos*, and *pathos*, *see infra* at 11.

21 *Greene, supra* note 2, at 1397.

22 *Id.* at 1424.

23 *Id.* at 1466–67 (reviewing the debate between “mainstream legal . . . scholars,” “attitudinalists, and pragmatists,” who all differ on whether constitutional law’s ostensibly specialized discourse actually constrains judicial reasoning and case outcomes).

24 *Id.* at 1424.

25 *See id.* at 1393 (noting that “[l]aw and literature scholars have approached law as a form of rhetoric, but have not much integrated their accounts with those offered within more mainstream constitutional scholarship”) (citing JAMES BOYD WHITE, *HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985); Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201 (1990)). Of course, the law and rhetoric literature has grown enormously since the work of pioneers like professors White and Ferguson. *See, e.g.*, BROWN V. BOARD OF EDUCATION AT FIFTY: A RHETORICAL PERSPECTIVE, at xii (Clarke Rountree ed., 2004); NEIL MACCORMICK, *RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING* (2005); FRANCIS J. MOOTZ III, *RHETORICAL KNOWLEDGE IN LEGAL PRACTICE AND CRITICAL LEGAL THEORY* (2006); *THE RHETORIC OF LAW* (Austin Sarat & Thomas R. Kearns eds., 4th ed. 1997); Linda L. Berger, *Studying and*

both as a species of practical argument and as a specialized discourse unto itself.²⁶ At its heart, rhetoric promotes a radical discursive awareness that explains how proof and persuasion operate in any field.

As Aristotle defined it, the art of rhetoric is “an ability, in each [particular] case, to see the available means of persuasion.”²⁷ Note how Aristotle confines rhetoric to the “available” means of persuasion. Means of persuasion available in one discourse may not be available at all in another. Proof admissible in one field of argument may be entirely illegitimate in a different field.²⁸ As Chaïm Perelman observes: “Each field of thought requires a different type of discourse; it is as inappropriate to be satisfied with merely reasonable argument from a mathematician as it would be to require scientific proofs from an orator.”²⁹ Rhetoric recognizes this reality yet still provides a systematic approach to proof and persuasion that applies across all argument fields.³⁰

Logos, *ethos*, and *pathos* form the backbone of this systematic approach. *Logos* concerns reason.³¹ *Ethos* concerns authority.³² And *pa-*

Teaching “Law as Rhetoric”: A Place to Stand, 16 J. LEGAL WRITING INST. 3 (2010); Marouf Hasian, Jr. & Earl Croasmun, *Rhetoric’s Revenge: The Prospect of a Critical Legal Rhetoric*, 29 PHIL. & RHETORIC 384 (1996); Hanns Hohmann, *The Dynamics of Stasis: Classical Rhetorical Theory and Modern Legal Argumentation*, 34 AM. J. JURIS. 171 (1989); Kristen K. Robbins-Tiscione, *A Call to Combine Rhetorical Theory and Practice in the Legal Writing Classroom*, 50 WASHBURN L.J. 319 (2011); Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 J. ASS’N LEGAL WRITING DIRS. 129 (2006); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1373 (1995). Despite the vastness of this literature, it remains true that its contributors have not systemically integrated their accounts with Bobbitt’s influential argument typology of constitutional argument. But see EUGENE GARVER, FOR THE SAKE OF ARGUMENT: PRACTICAL REASONING, CHARACTER, AND THE ETHICS OF BELIEF 161–65 (2004) (analyzing Bobbitt’s typology as demonstrating argumentative pluralism in law). Greene’s innovation was thus long overdue.

26 Here I develop concepts introduced in prior rhetorical work. See Colin Starger, *Death and Harmless Error: A Rhetorical Response to Judging Innocence*, 108 COLUM. L. REV. SIDEBAR 1 (2008); Colin Starger, *The DNA of an Argument: A Case Study in Legal Logos*, 99 J. CRIM. L. & CRIMINOLOGY 1045 (2009); Colin Starger, *The Virtue of Obscurity*, 59 VILL. L. REV. TOLLE LEGE 17 (2013).

27 ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 36 (George A. Kennedy trans., 2d ed. 2007) [hereinafter ARISTOTLE]. Please note that although I will generally refer to the second edition of George Kennedy’s Aristotle translation, Professor Greene relies exclusively on the first edition. See *supra* note 20.

28 See STEPHEN E. TOULMIN, THE USES OF ARGUMENT 14 (updated ed. 2003) (defining argument fields).

29 CHAÏM PERELMAN, THE REALM OF RHETORIC 3 (William Kluback trans., 1982).

30 Cf. TOULMIN, *supra* note 28, at 14–15 (distinguishing between “the form and merits of our arguments [that] are field-invariant and . . . field-dependent”).

31 Although Greene translates *logos* as “appeal[] to logic,” Greene, *supra* note 2, at 1394, I have previously argued at length why rhetorical *logos* more broadly concerns argument

thos concerns emotion. Aristotle classified all three of these concepts as rhetorical species of *pistis* (plural: *pisteis*).³³ Although Greene usually refers to the *pisteis* as “forms of rhetoric” or “modes of persuasion,”³⁴ it bears emphasis that the word may also be translated as “proof.”³⁵ Acknowledging *logos*, *ethos*, and *pathos* as species of proof as well as modes of persuasion drives home the rhetorical perspective. *Proof* in a discourse is what *persuades* in a discourse.³⁶

Although ancient in origin, this perspective on proof has radical contemporary implications when applied to constitutional discourse. Specifically, the rhetorical perspective suggests that proof in constitutional argument is not strictly governed by propositional logic. Even as he defends the legitimacy of *pathos*-based appeals, Greene fails to come to grips this implication. This Article therefore takes up the task.

II. *PATHOS* AND NON-PROPOSITIONAL ARGUMENT

When Bobbitt first set down his theory of constitutional argument types, he proposed to describe each type using a term of art: “modality.”³⁷ Significantly, Bobbitt borrowed the concept of modality from

based on *reason*. See Starger, *DNA of an Argument*, *supra* note 26 at 1054–55. In short, logic has a narrow and formal connotation that does not capture the range of rational argument properly implied by *logos*. *Id.*

32 Greene defines *ethos* as “appeal[] to the speaker’s character.” Greene, *supra* note 2, at 1395. However, I see rhetorical *ethos* as more broadly concerning appeals to authority. See *infra* at 18–20 (setting out a justification for this view).

33 See ARISTOTLE, *supra* note 27, at 38–39. Aristotle distinguishes between *pisteis* intrinsic to the art of rhetoric—*logos*, *ethos*, and *pathos*—and extrinsic or “non-artistic” *pisteis*. *Id.* at 38. The conceptual difference between artistic and non-artistic *pisteis* rests on *invention*. Advocates do not invent non-artistic *pisteis*; they are externally provided, and advocates use them to prove their case. *Id.* Aristotle identified several extrinsic proofs such as “witnesses,” “testimony of slaves taken under torture,” and “contracts.” *Id.* In broad strokes then, non-artistic proofs concern evidence rather than argument.

34 See, e.g., Greene, *supra* note 2, at 1394 (labeling a pathetic appeal as “a mode of persuasion” and then distinguishing subjects of argument from “forms of rhetoric”).

35 ARISTOTLE, *supra* note 27, at 31, n.11. Depending on context, *pistis* may take on many meanings including “appeal,” “belief,” “trust,” and “faith.” *Id.*; see also GARVER, *supra* note 25, at 3 (framing an entire book of essays as “a meditation on the connections among those terms [translating *pistis*]”).

36 More than this, the very concept of a “discourse”—a communication triangle joining speaker, audience, and subject matter in language—is itself bounded by *logos*, *ethos*, and *pathos*. See Starger, *DNA of an Argument*, *supra* note 26 at 1056–57; cf. Greene, *supra* note 2, at 1399 (rhetoric is “attuned not just to speaker (hence, *ethos*) and subject (hence, *logos*), but also to audience (hence, *pathos*)” (emphasis added)).

37 See BOBBITT, *CONSTITUTIONAL INTERPRETATION*, *supra* note 1, at 11–22.

analytic philosophy and then applied this analytic concept to law.³⁸ He defined constitutional modalities as “the ways in which legal propositions are characterized as true from a constitutional point of view.”³⁹ On Bobbitt’s widely shared view, bona fide constitutional arguments are thus propositional. We might characterize their basic form like this: *Proposition P (about the Constitution) is true because* [constitutional argument].

From a rhetorical perspective, propositional accounts of constitutional argument misunderstand the nature of legal *adjudication*. The law adjudicates disputes. As in all cases, judges in constitutional disputes must *decide the case*.⁴⁰ Judges must judge.⁴¹ Establishing the truth or falsity of legal propositions is thus secondary to reaching judgment. In any given case, the bottom line is who wins or loses. On this adjudicatory view, constitutional arguments provide the grounds for deciding who wins or loses constitutional cases. We might characterize this argument form: *Litigant L wins (the instant constitutional controversy) because* [constitutional argument].

Since arguments in constitutional adjudication ultimately seek to persuade judges about outcomes in concrete cases, any analogy between legal argument and dispute in formal scientific or mathematical discourse is incomplete. Arguments in purely analytic disciplines can exclusively turn on abstract propositions because there is no judgment imperative. Proving or disproving propositions is the only point of the argument. Not so in law. Judgment comes first and judgment is not *always* analytic.

Now it is of course correct that *most* constitutional arguments are propositional. Giving reasons why proposition P (about the Constitution) is true or false is both extremely desirable and absolutely critical

38 See *id.* at 12, 194 n.3 (discussing modal analysis of Russell and Carnap). For a rigorous analysis of the role of modality in practical argument, see generally TOULMIN, *supra* note 28, at 28–36 (distinguishing between the force and criteria of modal terms). Toulmin specifically faults Carnap for “failing to attend sufficiently to the practical function of modal terms.” *Id.* at 44.

39 BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 1, at 12.

40 Though Bobbitt’s typology rests on a propositional account of constitutional argument, even he recognizes the primacy of decision-making in constitutional adjudication. See BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 1, at 166–67 (recounting the story of a then-newly appointed Judge Henry Friendly seeking advice from his mentor, Judge Learned Hand, on how to approach a tricky legal problem; Hand listened and then said: “Damn it, Henry, just decide it! That’s what you’re paid for”).

41 Perhaps the most famous codification of this judgment imperative is Article 4 of the Napoleonic Code, which prohibited judges from refusing to decide cases “on the ground of the silence, obscurity, or deficiency of the law.” See CHAÏM PERELMAN & L. OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION § 13, at 131 (John Wilkinson & Purcell Weaver trans., 1969) (quoting Code Napoléon, art. 4).

for the development of constitutional law over time. Propositional arguments drive academic constitutional law discourse and dominate the text of non-perfunctory Supreme Court opinions. This is as it should be—given the law's commitment to elaborating coherent rules. Thus, we can characterize the vast majority of constitutional arguments as having this form: *Litigant L wins (the instant constitutional controversy) because proposition P (about the Constitution) is true* → *Proposition P is true because* [constitutional argument].

So when do constitutional arguments take non-propositional forms? When do arguments directly support a judgment without making a specific claim about constitutional meaning? In a word, the answer here is *pathos*. *Pathos*-based arguments sometimes make non-propositional appeals to judgment. Though Greene never challenges Bobbitt's propositional conception of modality, his conceptualization of *pathos* in constitutional adjudication effectively makes the point:

[I]n constitutional law, pathos is better described as a feature of constitutional conversation, a means rather than an end. The appeal to pathos occurs not because pathos offers information about substantive constitutional content but because appealing to pathos helps win constitutional arguments. Pathetic legal argument, then, is a mode of persuasion as to the substance or valence of particular legal propositions⁴²

In other words, *pathos*-based arguments do not always directly assert substantive propositions about the Constitution. Sometimes *pathos*-based appeals provide valence; they give emotional weight to particular propositions elsewhere advanced through *logos*- and/or *ethos*-based argument.

This is an important insight. Without making the point explicitly, Greene's article demonstrates that Bobbitt's concept of modality needs to be modified to account for non-propositional pathetic appeals. Pathetic appeals bypass ordinary propositional argument by directly "manipulat[ing] the reader's emotions in order to persuade her as to the ultimate adjudicative outcome."⁴³ As Greene elegantly puts it: "Some outcome must be thus because deep down in your heart you know thus to be true."⁴⁴

To get a flavor of how non-propositional argument plays out in practice, consider a brief example. Greene points us to Justice Anthony M. Kennedy's dissent in *Stenberg v. Carhart*, a case concerning a

⁴² Greene, *supra* note 2, at 1422.

⁴³ *Id.* at 1394.

⁴⁴ *Id.* at 1422.

Nebraska state law that prohibited so-called “partial birth” abortions.⁴⁵ A five-Justice majority struck down the Nebraska law.⁴⁶ In his dissent, Kennedy described the contested abortion procedure this way: “The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn limb from limb.”⁴⁷ According to Greene, Kennedy’s “gruesome description” in this passage is “designed deliberately to disgust and to shame the audience” and is “integral to the dissent’s rhetorical mission.”⁴⁸

Now critics sympathetic to Bobbitt might object to calling the quote from Kennedy an *argument*—or at least to calling the quote a complete argument. Instead, Kennedy’s words seem to constitute a *move* within an argument. According to this critique, it is wrong to call this move an argument because Kennedy’s description does not state a proposition about what the Constitution means. It does not posit that outlawing partial-birth abortions is permissible under the Constitution *because* “the fetus . . . bleeds to death as it is torn limb from limb.”

The rhetorical response to this critique invokes the judgment imperative. All argument in *Carhart* ultimately supported judgment on Nebraska’s law, whether it would stand or fall. Although Kennedy’s “gruesome description” does not defend a specific proposition about the Constitution, it does express a coherent ground for ruling in favor of Nebraska. It expresses the *argument* that Nebraska should win because of the horror of the gruesome procedure.

Recognizing Kennedy’s *pathos* in *Carhart* as an argument does not mean his was a good argument or a legitimate one. Let us focus on the legitimacy question for a moment.⁴⁹ If it stood alone, Kennedy’s *pathos* would in fact be illegitimate. This is precisely because his argument defends no proposition about the Constitution. (Propositions are necessary for legitimacy.) Kennedy’s *pathos*, however, does not stand alone. His *pathos* instead works in conjunction with his doctrinal argument that the Nebraska law was consistent with rules set down in precedent.⁵⁰ While his doctrinal argument primarily pro-

45 See *id.* at 1394 (citing Justice Kennedy’s dissent in *Stenberg v. Carhart*, 530 U.S. 914 (2000) as an example of pathetic argument).

46 *Carhart*, 530 U.S. at 936–37 (finding the law unconstitutional because it lacked any exception for preservation of health of the mother).

47 *Id.* at 958–59 (Kennedy, J., dissenting).

48 Greene, *supra* note 2, at 1394.

49 On the other hand, assessing the merits of the conflicting positions in the abortion debate is well beyond the scope of this Article.

50 Kennedy’s doctrinal argument focused on *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). See generally *Carhart*, 530 U.S. at 960–66 (Kennedy, J., dissenting) (con-

ceeds via appeals to reason (*logos*) and authority (*ethos*), Kennedy's *pathos* provides an emotional impetus to accept his doctrinal interpretation above that of the majority.

Even if we disagree with Kennedy's doctrinal argument, we cannot deem it illegitimate—it did not fundamentally deviate from accepted norms of constitutional debate. Since Kennedy's *pathos* only served to give his otherwise legitimate doctrinal argument emotional valence, it would be pointless to judge his *pathos* illegitimate. Pathetic arguments may not assert propositions about constitutional meaning, but *pathos* plays an integral role in persuasion and is unavoidable when judgment is at stake. This is a necessary implication of Greene's article and a point worth making explicit.

III. *PISTEIS, TOPOI* AND MODALITY

Bobbitt's original typology names six different constitutional "modalities": historical, textual, structural, doctrinal, prudential and ethical. Greene now challenges this typology as failing to distinguish between the "subjects" of constitutional argument and its "forms of rhetoric."⁵¹ Greene identifies the forms of rhetoric as *logos*, *ethos*, and *pathos* and claims that all of Bobbitt's archetypes (except ethical argument) are better understood as subjects of constitutional argument.⁵² While the distinction between constitutional subjects and modes of rhetoric is analytically sound, Greene's new framework suffers from terminological confusion. This Part, therefore, makes a brief taxonomic intervention.

Consider the table below, which is a simplified version of one that appears in Greene's article under the heading: MODALITIES OF ARGUMENT AND MODES OF PERSUASION.

testing the majority's holding by reasoning that the principles in *Casey*, as applied to the facts before the *Carhart* Court, "demonstrate[] that the interests asserted by the State are legitimate and recognized by law").

51 Greene, *supra* note 2, at 1394.

52 *Id.* at 1394, 1445.

	LOGOS	ETHOS	PATHOS
TEXT			
HISTORY			
DOCTRINE			
STRUCTURE			
CONSEQUENCES			

Figure 1: Greene's Argument Table⁵³

The labels for each axis implied by the table heading are less than ideal. "Modes of persuasion" refers to *logos*, *ethos*, and *pathos* while "Modalities of Argument" presumably refers to text, history, doctrine, structure, and consequences.

The issue with the "modes of persuasion" label is relatively minor. In his article, Green refers to *logos*, *ethos*, and *pathos* as "forms of rhetoric" or "modes of persuasion."⁵⁴ While these two descriptions are quite correct, it is important to recall that *pisteis*—the word Aristotle used to describe the rhetorical genus uniting the species of *logos*, *ethos*, and *pathos*—can also be translated as "proof."⁵⁵ Using the same word to describe proof and persuasion hammers home the rhetorical perspective on discourse: proof is what persuades. In order to keep this perspective present, it seems prudent to generically refer to *logos*, *ethos*, and *pathos* as *pisteis*.⁵⁶

The problem with Greene's "modalities of argument" label is more serious. Elsewhere in his article, Greene variously refers to the legitimate "subjects" of constitutional argument as "types," "arche-

⁵³ See *id.* at 1443 tbl.1.

⁵⁴ See, e.g., Greene, *supra* note 2, at 1394 (labelling a pathetic appeal as "a mode of persuasion" and then distinguishing subjects of argument from "forms of rhetoric").

⁵⁵ See ARISTOTLE, *supra* note 27, at 31 n.11.

⁵⁶ Greene does refer to *pisteis* once in his article. See Greene, *supra* note 2, at 1398. My modest suggestion is to use the term generically.

types,” and “modalities.” While Greene’s type/archetype nomenclature makes sense,⁵⁷ his use of “modality” elides the very distinction he seeks to establish. This is because “modality” is Bobbitt’s term of art, and Greene’s basic claim is that Bobbitt’s framework improperly fails to distinguish between rhetorical mode and constitutional subject. Given this, it seems unwise to utilize Bobbitt’s loaded term of art at all.⁵⁸

Sticking to Aristotle’s rhetorical nomenclature avoids such confusion. The appropriate rhetorical term for the axis referring to the subjects of constitutional argument is *topos* (plural: *topoi*). *Topos* means “place,” and *topoi* are often referred to as “rhetorical topics.”⁵⁹ For Aristotle, *topoi* were the metaphorical places in a discourse where speakers could look to find stock themes to build their arguments.⁶⁰

Aristotle distinguished between “common topics” and “special topics.”⁶¹ Common topics referred to lines of argument potentially relevant across all discourses.⁶² This included arguments about “the

57 As a synonym for “category,” “type” carries no distracting substantive or analytical connotations. “Archetype” is a similarly generic term for a quintessential category.

58 To make matters worse, Greene at one point suggests that Bobbitt’s understanding of modality actually better aligns with the modes of persuasion defined by *logos*, *ethos*, and *pathos*. Greene, *supra* note 2, at 1445 n.312. This would suggest that the labels on Greene’s grid should be reversed. Greene’s equivocation between “modality” as “subject” versus “mode of persuasion” results in sentences like this: “Each [case] fits into a more conventional modality—just not necessarily the logical mode of that modality.” *Id.* at 1445. Referring to the the modes of a modality is as imprecise as referring to the parts of a partition.

59 ARISTOTLE, *supra* note 27, at 44. See also KATIE ROSE GUEST PRYAL, A SHORT GUIDE TO WRITING ABOUT LAW 34 (2011). Rhetoricians sometimes refer to *topoi* by their Latin name—*loci* (singular: *locus*). See, e.g., PERELMAN & OLBRECHTS-TYTECA, *supra* note 41, at 83–99 (analyzing various *loci* in argument). Of course, *Topics* is also the name of Aristotle’s treatise on dialectical reasoning. *Id.* at 5, 83. As Perelman has persuasively demonstrated, Aristotle’s separate treatment of “dialectic” in *Topics* and “rhetoric” in *On Rhetoric* rests on an analytically unnecessary distinction between arguments before individuals and crowds. PERELMAN, *supra* note 29, at 4–5. Modern rhetoric is rightly concerned with discourse addressed to any sort of audience and therefore subsumes the formerly separate category of dialectical reasoning contained in Aristotle’s *Topics*. *Id.* at 5.

60 See ARISTOTLE, *supra* note 27, at 44. As Kennedy points out, ancient rhetorical handbooks also provided literal places to find *topoi*. *Id.* See also PERELMAN & OLBRECHTS-TYTECA, *supra* note 41, at 83 (“As used by classical writers, *loci* [*topoi*] are headings under which arguments can be classified. They are associated with a concern to help a speaker’s inventive efforts and involve the grouping of relevant material, so that it can easily be found again when required. *Loc*i have accordingly been defined as storehouses for arguments.”).

61 See ARISTOTLE, *supra* note 27, at 45 n.68. See also PERELMAN & OLBRECHTS-TYTECA, *supra* note 41, at 83.

62 See PERELMAN & OLBRECHTS-TYTECA, *supra* note 41, at 83 (defining “common places” as arguments that “can be used indiscriminately for any science and [that] do not depend on any”).

possible and impossible,” “past and future fact” and “degree of magnitude or importance,” as well as arguments from grammatical form, analogy, definition, division, induction, purpose, consequence, and so on.⁶³ Special topics, on the other hand, were discourse-specific. For example, special topics in politics considered subjects like finances, war and peace, national defense, imports and exports, and the framing of laws.⁶⁴ Aristotle also analyzed special topics in judicial rhetoric, systematically considering subjects relevant to debates over “justice and injustice” and “wrongdoers and those wronged.”⁶⁵

Returning to Bobbitt and Greene, it seems proper to describe as special constitutional law *topoi* those argument categories described by text, history, structure, doctrine, and consequences.⁶⁶ These *topoi* point to the subjects for argument accepted as legitimate in constitutional controversies. If an advocate or judge wishes to make an argument for or against the constitutionality of a contested law, for example, she will consider lines of analysis elaborating upon *topoi* of text, doctrine, or so on. At the same time, she will not waste time inventing arguments wholly disconnected from these legitimate topics.⁶⁷ Constitutional law *topoi* neither state transcendent truths about the Constitution, nor indicate answers to disputed questions. Rather, they provide subject-matter tools to aid invention.

The two-dimensional approach thus disaggregates Bobbitt’s framework along the axes of content and form. While *topoi* inspire the content of argument, *pisteis* provide rhetorical form. This disaggregation actually helps clarify the meaning of Bobbitt’s troublesome notion of “modality.”

63 See ARISTOTLE, *supra* note 27, at 157–61, 172–84. As a relentless classifier, Aristotle naturally used different words to describe different kinds of common topics. However, it seems best not to dive too deeply into Greek soup for the purposes of this constitutional law and rhetoric project.

64 *Id.* at 53.

65 See *id.* at 92–100.

66 For now, I leave off Bobbitt’s category of ethical argument. Part IV *infra* will reintroduce this category and argue for the necessity of its inclusion in the list of legitimate constitutional *topoi*.

67 Though he does not use the term, Bobbitt vividly describes the futility of advancing arguments not drawn from accepted *topoi*. See BOBBITT, CONSTITUTIONAL FATE, *supra* note 1, at 6 (“One does not see counsel argue, nor a judge purport to base his decision, on arguments of kinship Nor does one hear overt religious arguments or appeals to let the matter be decided by chance or reading entrails.”).

As noted above, Bobbitt defined constitutional modalities as “the ways in which legal propositions are characterized as true from a constitutional point of view.”⁶⁸ Ways of characterizing constitutional truth necessarily involve both content and form. Modality is thus best understood as describing the discursive intersection of *topoi* and *pisteis*—the union of content and form in actual constitutional argument. This modified understanding of modality can be visualized using a new grid.

		Modes of Proof (Pisteis)		
		Logos	Ethos	Pathos
Subjects of Argument (Topoi)	Text			
	History			
	Structure			
	Doctrine			
	Consequences			
	Value			

Figure 2: Constitutional Modalities: Union of Pisteis and Topoi

Careful readers will note that the figure above changes more than just the labels on Greene’s table. The list of *topoi* contains one subject of constitutional dispute that Greene does not recognize—value argument. This Article maintains that Greene’s failure to include value argument as a legitimate *topos* is a critical error and the one that most threatens the vitality of the constitutional law and rhetoric project. The next Part defends that charge.

68 See *id.* at 12. As argued *supra* in Part III, I find Bobbitt’s insistence that modality is propositional to be incomplete given the judgment imperative.

IV. VALUE ARGUMENT IN CONSTITUTIONAL LAW

After transforming Bobbitt's one-dimensional list of argument modalities into a two-dimensional grid, Greene proposes another major structural change to Bobbitt's typology. Specifically, Greene advocates removing Bobbitt's category of "ethical argument" from the list of legitimate constitutional subjects of argument (which we now call *topoi*).⁶⁹ Greene's move has obvious roots in Bobbitt's peculiar nomenclature: Bobbitt defines "ethical" arguments as "deriving rules from those moral commitments of the *American ethos* that are reflected in the Constitution."⁷⁰ Greene interprets this reference to *ethos* as invoking a concept "parallel to rather than modified by *logos* and *pathos*."⁷¹ He therefore concludes that "ethical argument" is better understood as invoking a mode of persuasion (which we now call *pistis*).⁷²

The problem with Greene's analysis is that it conflates different meanings of *ethos*. Bobbitt never used *ethos* in the rhetorical or argumentative sense. Rather, Bobbitt's category of ethical argument essentially mirrors what Richard Fallon later called "value arguments."⁷³ Greene's reclassification of Bobbitt's ethical category thus infelicitously removes value arguments from the list of legitimate constitutional law *topoi*. This is a mistake because value arguments play a vital role in constitutional adjudication. The obvious solution is to reinstate value arguments as a legitimate constitutional *topos* and to acknowledge the *logos*-, *ethos*-, and *pathos*-based dimensions of this subject.

A. *Ethical Argument v. Proof by Ethos*

Since Bobbitt's ethical modality has attracted criticism, Greene's purging of the category from his argument typology is understandable. Indeed, some have denounced the ethical modality as "misleading" and "seriously flawed."⁷⁴ These critics have a point; Bobbitt's

69 Green, *supra* note 2, at 1443–44.

70 BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 1, at 13 (emphasis added).

71 Greene, *supra* note 2, at 1443.

72 *Id.* at 1444.

73 See Fallon, *supra* note 19, at 1204–05 ("Although various other definitions would be possible, I shall use the term 'value argument' to refer only to claims about the moral or political significance of facts or about the normative desirability of outcomes.").

74 See Greene, *supra* note 2, at 1444 ("It is for like reasons that Bobbitt's treatment of this category has been called 'idiosyncratic,' 'misleading,' and 'seriously flawed.'") (citing Daniel A. Farber, *Book Review*, 67 MINN. L. REV. 1328, 1332 (1982); Martin H. Redish, *Judicial Review and Constitutional Ethics*, 82 MICH. L. REV. 665, 671 (1984)).

analysis of ethical argument can be obscure. Despite this academic bathwater, there is a baby worth saving. For Bobbitt is surely correct that the moral commitments of our constitutional system remain a legitimate subject for constitutional argument.

Greene's apparent rejection of this sensible position may be rooted in terminological confusion. The culprit word is "ethical." Greene argues that "remaining faithful to the Aristotelian conception of *ethos*" requires him to interpret Bobbitt's ethical category of argument as "parallel to rather than modified by *logos* and *pathos*."⁷⁵ In other words, *ethos* belongs in the same category as *logos* and *pathos*. Though this sounds reasonable enough, the reality is that Bobbitt never used *ethos* in its rhetorical sense.

The word *ethos* actually has multiple meanings. In *Constitutional Fate*, Bobbitt explains the meaning he intended:

In the end I decided on the term "ethical" largely because of its etymological basis. Our word "ethical" comes from the Greek ἠθικός (*ethikos*), which meant "expressive of character" when used by the tragedians. It derives from the ἦθος (*ethos*) which once meant the *habits* and character of the individual, and is suggestive of the constitutional derivation of ethical arguments.⁷⁶

This passage makes crystal clear that Bobbitt uses *ethos*/"ethical" in the manner of the Greek *tragedians*—not Greek *rhetoricians*.⁷⁷ Tragedians embraced "character" as a poetic-moral concept. Consistent with this, Bobbitt invokes *ethos* only in its derived, ordinary-English sense: "the distinguishing character, sentiment, moral nature, or guiding beliefs of a person, group, or institution"⁷⁸ (since he uses it in its ordinary-English sense, Bobbitt does not subsequently italicize "ethos"). Bobbitt's ethical modality thus concerns moral beliefs inherent in the American constitutional ethos.

Contrast this with the technical meaning of *ethos* in rhetoric. In argument theory, *ethos* refers to form of proof, a mode of persuasion. Rather than proof by reason (*logos*) or emotion (*pathos*), *ethos* concerns proof by authority. Aristotle rooted his concept of *ethos* in the

⁷⁵ Greene, *supra* note 2, at 1443 (emphasis added).

⁷⁶ Bobbitt, *CONSTITUTIONAL FATE*, *supra* note 1, at 95.

⁷⁷ Despite some overlap, the tragedians and rhetoricians were by and large separate. Aristotle did write about theory of tragedy in *Poetics*, of course, and therein analyzed *ethos* as a tragic concept. However, he did not employ the word in the same way in his analysis of argument. Compare James Hutton, *Introduction to ARISTOTLE'S POETICS* 7 (James Hutton trans. 1982) (noting the different senses of "ethos" in *POETICS*) with ARISTOTLE, *supra* note 27, at 38 (identifying *ethos* as rhetorical *pisteis*).

⁷⁸ *Ethos Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/ethos> (last visited Mar. 21, 2016).

authority of an argument's advocate—the speaker.⁷⁹ Though Aristotle undeniably linked proof by *ethos* to the “character” of the speaker, his underlying focus was on the authority of the speaker's argument.⁸⁰ For Aristotle then, proof by *ethos* did not proceed “from a previous opinion that the speaker is a certain kind of person.”⁸¹ Instead, persuasion by *ethos* “should result from the speech.”⁸²

It is no accident that Aristotle called *ethos* “the most authoritative form of persuasion.”⁸³ *Ethos*, properly understood in rhetoric, is authority.⁸⁴ Certainly, it makes sense to conceive of authority as a distinct mode of proof in law. Sometimes a judge will determine that the law means X based on a reasoned interpretation of sources A, B, and C. This is proof by *logos*. Occasionally, as Greene points out, the law will mean X because the judge feels X is true “deep down in [her] heart.” This is persuasion through *pathos*. And very often, a judge will find the law means X simply because *authority says* the law means X. This is proof by *ethos*.

Proof by authority is entirely different than proof by reason or through emotion. Greene practically acknowledges as much, noting at one point that “the ipse dixit character of . . . argumentation suggests an ethical cast.”⁸⁵ Ipse dixit (“he, himself said it”) is the paragon of argument based on naked authority rather than reason. Of course, every *ethos*-based argument need not make such a raw appeal to power. The point is just that *ethos* persuades through the authority of “character,” not through character itself. Equally important, *ethos* need not derive from *moral* authority to persuade. Depending on the discourse, successful authority can also be legal, religious, parental, academic and so on.

79 See ARISTOTLE, *supra* note 27, at 38, n.40 (“Here . . . the role of character in speech is regarded as making the speaker seem trustworthy.”).

80 *Id.* at 38–39 & n.41 (“Unlike Isocrates[,], . . . Aristotle does not include in rhetorical *ethos* the authority that the speaker may possess due to position in government or society, previous actions, reputation, or anything except what is actually said in speech.”).

81 *Id.* at 39.

82 *Id.*

83 *Id.*

84 Though I see this as entirely consistent with Aristotle, I concede that he did not directly advocate this position. However, building upon Aristotle's insights is standard practice in Neo-Aristotelian argument theory. Thus, Stephen Toulmin proposed his canonical argument schema to correct the ambiguities in Aristotle's syllogism between major premise and backing for major premise. TOULMIN, *supra* note 28, at 100–05. For his part, Chaim Perelman rejected Aristotle's distinction between rhetoric and dialectic to advance his unified theory of argument. See PERELMAN, PERELMAN & OLBRECHTS-TYTECA, *supra* note 41, at 5. Though Aristotle provides the starting point for any analysis of *ethos*, we need not give him the Last Word.

85 Greene, *supra* note 2, at 1445.

B. *Morals and Values*

Although Bobbitt's category of ethical argument shares its etymology with rhetorical *ethos*, the underlying concept is very different. Bobbitt uses the category to elucidate a particular kind of moral discourse in constitutional debate. By removing Bobbitt's ethical argument from his list of legitimate *topoi*, Greene effectively argues that reasoned (logical) discussion of values has no legitimate place in constitutional law. To demonstrate this, *Figure 3* below lists side-by-side the legitimate argument *topoi* recognized by Bobbitt,⁸⁶ Fallon,⁸⁷ and Greene.⁸⁸

Bobbitt	Fallon	Greene
Historical	Framers Intent	History
Textual	Text	Text
Structural	Constitutional Theory	Structure
Doctrinal	Precedent	Precedent
Prudential	[Policy]	Consequences
Ethical	Value	

Figure 3: Topoi Recognized by Bobbitt, Fallon, and Greene

The most striking feature of *Figure 3* is the level of agreement between these three prominent constitutional law theorists. The consensus is ironclad on four *topoi*: history (relying on the intentions of framers and ratifiers of the Constitution);⁸⁹ text (looking to the semantic meaning of the words and phrases in the Constitution);⁹⁰ structure (inferring rules from the relationships that the Constitution mandates among the structures it sets up);⁹¹ and precedent (applying

⁸⁶ See BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 1, at 12–13.

⁸⁷ See Fallon, *supra* note 19, at 1195–1209.

⁸⁸ See Greene, *supra* note 2, at 1443.

⁸⁹ See BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 1, at 12. Greene adopts Bobbitt's term here. Greene, *supra* note 2, at 1443. Although Fallon calls this *topos* "Framer's Intent," its synonymy with Bobbitt's and Greene's category is self-evident. See Fallon, *supra* note 19 at 1198–99.

⁹⁰ See, e.g., BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 1, at 12. The consensus is so complete on this *topos* that all three use the same word in the same way.

⁹¹ See, e.g., BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 1, at 12–13. Once again, Greene adopts Bobbitt's term. Greene, *supra* note 2, at 1443. As Greene notes, Fallon's category of "constitutional theory" captures precisely the same subject of argument. *Id.* at 1424 n.180.

rules generated by doctrine).⁹² The fifth *topos*—consequences (seeking to balance the costs and benefits of a particular rule)—also counts as an essentially agreed-upon category, even though the three theorists adopt different terms.⁹³

This leaves one final *topos*. Bobbitt calls it ethical argument, while Fallon calls it value argument. Greene offers no comparable legitimate subject of argument. This is unfortunate. Indeed, this omission actually undermines Greene's own admirable commitment to promoting democratic deliberation in constitutional law in light of our polity's core values.⁹⁴ The fatal flaw in Greene's approach is that it relegates all value debate to *pathos* through emotional appeals to history, text, structure, precedent and consequences. Yet rational *logos*-based debate over values is both a regular feature of constitutional discourse and normatively desirable.⁹⁵ Our constitutional argument typology should reflect this by including value as a legitimate subject.

To justify this conclusion, let us first revisit Bobbitt's ethical modality. As noted above, critics have previously attacked this category of Bobbitt's schema.⁹⁶ However, this criticism largely strikes at Bobbitt's particular implementation of the category; it does not question the abstract idea of a constitutional *topos* rooted in morality. Thus, Bobbitt's abstract assertion that ethical argument concerns moral commitments in the Constitution is not the same as his specific assertion that the "only American ethos reflected in the Constitution is the ethos of limited government."⁹⁷ Rebuke of the latter proposition

92 See Greene, *supra* note 2, at 1424. Though Bobbitt calls his category "Doctrinal," the relationship to precedent is again self-evident.

93 Greene explicitly aligns his notion of argument from "consequences" with Bobbitt's "prudential" category. See Greene, *supra* note 2, at 1441 ("Prudential or consequentialist argument . . . speaks to a certain judicial pragmatism that recognizes that securing the rule of law over time requires the exercise of practical wisdom. Judges must attend to the political and economic circumstances surrounding a decision.") (internal quotation marks omitted). Although Fallon does not assign such policy arguments a separate heading (thus the square brackets and italics in Figure 1), he includes arguments about political and economic consequences under the general header of "value arguments." See Fallon, *supra* note 19, at 1205 n.71, 1207 (acknowledging that his category of value arguments "sweeps in [policy] arguments").

94 See Greene, *supra* note 2, at 1452–56 (justifying pathetic argument as promoting democratic deliberation in light of values).

95 See *infra* Part V.C. (giving three examples of *logos*-based value argument from Fourth and First Amendment cases).

96 See *supra* note 74 and accompanying text.

97 Greene, *supra* note 2, at 1443 (citing BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 1, at 21; BOBBITT, CONSTITUTIONAL FATE, *supra* note 1, at 144–46).

does not call into doubt the former. A similar analysis diminishes the force of other common critiques of Bobbitt and ethical argument.⁹⁸

Yet we need not rely upon Bobbitt to see the sense of a separate value-based *topos*. Richard Fallon provides a more coherent and less controversial path to the same conclusion. Value argument plays a prominent role in Fallon's well-regarded constitutional argument typology.⁹⁹ According to Fallon, "value arguments assert claims about what is good or bad, desirable or undesirable, as measured against some standard that is independent of what the constitutional text requires."¹⁰⁰ He further distinguishes between two kinds of cases in which value arguments have a conventionally accepted role: (1) cases involving "constitutional language whose meaning has a normative or evaluative component;"¹⁰¹ and (2) cases "where arguments within other categories [of *topoi*] are indeterminate or closely balanced" and values appeals are made to break the deadlock.¹⁰²

Fallon's examples from his first category suffice to make the case for value argument as a legitimate *topos*. He notes that constitutional phrases like "*due process*," "*equal protection*," "*unreasonable search and seizure*," or "*cruel and unusual punishment*" require value judgment.¹⁰³ The text itself provides no guide to determining the proper criteria for implementing these "essentially contest[ed]" values and concepts.¹⁰⁴ An explicitly normative constitutional jurisprudence has consequently evolved in these areas that requires debate over "evolving standards of decency in a maturing society,"¹⁰⁵ "reasonable expectations of privacy"¹⁰⁶ and so on.¹⁰⁷

98 Consider, for example, Professor Farber's cutting critique of Bobbitt's notion that fairness to Indians reflects the American ethos. See Farber, *supra* note 74, at 1332. The undeniable reality of systematic mistreatment of Native Americans under U.S. law does negate the idea that moral commitments of the nation are a legitimate subject for constitutional discourse.

99 See Fallon, *supra* note 19, at 1204 ("Sometimes openly, sometimes guardedly, judges and lawyers make arguments that appeal directly to moral, political, or social values or policies. . . . Value arguments . . . enjoy almost total predominance, in much of the most respected modern constitutional scholarship.").

100 *Id.* at 1205.

101 *Id.*

102 *Id.* at 1207.

103 *Id.* at 1205 (collecting cases in these fields) (emphasis added).

104 *Id.*

105 Fallon, *supra* note 19, at 1206, n.78 (citing *Ford v. Wainwright*, 477 U.S. 399, 406 (1986)); see also, e.g., *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012) (invoking "evolving standards of decency" in striking down mandatory life without parole for juveniles); *Brown v. Plata*, 131 S. Ct. 1910, 1925, n.3 (2011) (considering "evolving standards of decency" in finding California prison overcrowding contravenes Eighth Amendment).

106 Fallon, *supra* note 19, at 1206 n.79 (citing *Hudson v. Palmer*, 468 U.S. 517, 525–28 (1984)). See also, e.g., *United States v. Jones*, 132 S. Ct. 945, 958 (2012) (Alito, J., concur-

Fallon's second category of value argument is even more instructive. This category relates directly to Fallon's analysis of the problem of commensurability in constitutional law.¹⁰⁸ When modalities of constitutional argument conflict and point in different directions—for example, imagine that textual analysis points to one outcome while historical analysis suggests the opposite—no meta-discursive mechanism exists to decide the conflict.¹⁰⁹ Constitutional argument types are thus incommensurable. This phenomenon resembles paradigm conflicts in science.¹¹⁰ Fallon suggests that value arguments play a special role in these situations.¹¹¹ When coherent arguments can be marshaled on either side of a constitutional question, values often do and legitimately should come into play.

This does not mean that all value arguments count as legitimate. Fallon argues that the certain “repositor[ies] of values” can be accepted as legitimate sources for value arguments (e.g., traditional morality, consensus values, natural law, economic efficiency) while other sources are rightly rejected (e.g., a judge's purely personal morality or religion or policy preferences).¹¹² Importantly, Bobbitt and Greene also share this concern with articulating an acceptable versus non-acceptable role for value argument. Bobbitt's unpopular solution is to tether acceptable value argument to an “American ethos.” Greene rejects Bobbitt's solution but then does not deal at all with Fallon's more direct approach.¹¹³

Greene's own solution is to tie all value argument to *pathos*. Of course, it is correct that emotional appeal has a legitimate place in constitutional discourse about values. It is also true that “emotion . . .

ring) (arguing that long-term GPS surveillance constitutes violation of “reasonable expectation of privacy”).

107 Perhaps the most explicitly normative standard in constitutional jurisprudence comes from substantive due process, which sometimes looks to the “traditions and conscience of our people.” See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 760 (2010) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)); see also *id.* (referring to other value-based substantive-due-process inquiries like “immutable principles of justice which inhere in the very idea of a free government”) (internal quotation marks omitted).

108 Fallon, *supra* note 19, at 1189.

109 *Id.* at 1191–92.

110 *Id.* at 1191 (citing, *inter alia*, KUHN, *supra* note 12).

111 Fallon *supra* note 19, at 1207 (“Confronted with contending theoretical arguments that are equally or nearly equally plausible, judges prefer those that accord with their views of justice or sound policy.”).

112 *Id.* at 1208–09.

113 Greene discusses Fallon's schema in some detail at the beginning of his article, but then drops all reference to him as he gets into the mechanics of his new schema re-classifying Bobbitt's category of “ethical argument” as a mode of persuasion. Greene, *supra* note 2, at 1433–34.

precedes and motivates assessments of value”¹¹⁴ and that “emotion reveals reasons, motivates action in service of reason, [and] enables reason.”¹¹⁵ Therefore, it would be a mistake to universally condemn or banish *pathos* from arguments conducted about history, text, doctrine, structure or consequences. The emotional valence of arguments about these *topoi* can usefully invoke value into deliberation.

Yet it does not follow that therefore *all* value arguments should be tethered to *pathos*. For it is more than possible to debate values in a strictly rational—that is to say *logos*-based—mode. Indeed, rational deliberation about values is critical for deciding close cases that require a frank assessment of our collective priorities. Fallon’s work proves as much. Emotion is necessary, but it is not sufficient. Greene appreciates deliberation about values, but his schema leaves no room for independent *logos*- or *ethos*- based proof about the subject.

The simple solution to this shortcoming is to insert Fallon’s *topos* of value argument back into Greene’s rhetorical schema. *Figure 2* reproduced again below visualizes the reformed schema. Note how this new configuration still leaves room for all the kinds of pathetic appeals that Greene compellingly defends. It just also opens up more space for understanding legitimate value argument in constitutional law. Recognizing value argument as a legitimate *topos* invites rhetorical analysis of Perelman’s vital concept of “value hierarchies.”¹¹⁶

Modes of Proof (Pisteis)			
Subjects of Argument (Topoi)	Logos	Ethos	Pathos
	Text		
	History		
	Structure		
	Doctrine		
	Consequences		
	Value		

Figure 2: Constitutional Modalities: Union of Pisteis and Topoi

114 Greene, *supra* note 2, at 1449.
115 *Id.* at 1450 (quoting Terry A. Marony, *The Persistent Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 642 (2011)).
116 See PERELMAN, *supra* note 29, at 80–83.

Before exploring some examples of value argument in action, a brief note about the visualization is in order. The grid's solid lines should not be read to imply solid boundaries between different *topoi* and *pisteis*. On the contrary, real life constitutional arguments often defy neat categorization and any given argument may implicate more than one constitutional subject or mix appeals to *logos*, *ethos*, and *pathos*. Yet this fluid and multi-faceted reality does not undermine the grid's schematic utility. The map is not the territory; it is rather a tool to help identify and navigate the complex dynamics of persuasion in constitutional discourse.

C. Three Examples of Value Argument

Having set out the rhetorical theory, the time has come to examine value argument in practice. We will consider three brief examples: one taken from Fourth Amendment jurisprudence and two from the First Amendment realm. Each example considers the phenomenon from a different angle. Taken together, the examples illustrate the centrality of value argument to our deepest constitutional conflicts.

Consider first *Maryland v. King*.¹¹⁷ *King* was a 5-4 decision in which the majority upheld Maryland's law authorizing the collection and analysis of DNA taken from people arrested for, but not convicted of, certain serious crimes.¹¹⁸ Debate in the case formally turned on *topoi* of doctrine and consequences.¹¹⁹ Yet the conflict also implicated values at a very deep level. In his dissent's conclusion, Justice Antonin Scalia wrote:

Today's judgment will, to be sure, have the beneficial effect of solving more crimes; then again, so would the taking of DNA samples from anyone who flies on an airplane[,] . . . applies for a driver's license, or attends a public school. Perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.¹²⁰

117 *Maryland v. King*, 133 S. Ct. 1958 (2013).

118 *Id.* at 1958.

119 Doctrinal argument included whether *King*'s case fell under prior caselaw requiring "individualized suspicion" as opposed to more general "reasonableness." Compare *id.* at 1969-70 (analyzing cases), with *id.* at 1981-82 (Scalia, J., dissenting) (offering competing interpretation of doctrinal requirements). Arguments from consequences weighed the government's practical interest in "identification" against arrestees' reduced interest in privacy. *Id.* at 1975-78.

120 *Id.* at 1989 (Scalia, J., dissenting).

This short passage is pure value argument. And it relies upon *logos*, *ethos*, and *pathos* to condemn the majority's decision.

The *pathos* in Scalia's argument here comes in his reference to a "genetic panopticon." He seeks to evoke a visceral reaction against the Maryland law by equating it with Big Brother surveillance. He does not, however, rationally justify calling an arrestee-only law a "panopticon." Scalia's reference to "the proud men who wrote our charter of liberties" and their likely reaction to the prospect of "open[ing] their mouth for royal inspection" sounds in both *pathos* and *ethos*. The humor is *pathos*. The reference to the founding generation and the implicit plea to their authority on this question exemplifies *ethos*.

At the same time, the whole paragraph is framed by *logos*. And it is a *logos* rooted in value hierarchy. Scalia admits that solving crimes using DNA testing has value. However, he posits that this crime-solving value does not always trump Fourth Amendment liberty (he places liberty higher in the value hierarchy). To persuade his reader on this point, Scalia reasons that a contrary value hierarchy would justify taking the DNA of anyone who flies on an airplane, applies for a driver's license, or attends public school. Whether readers approve or disprove of Scalia's logic here, there is no doubt that it is a *logos*-based argument *about values*.

Few would dispute that Scalia's analysis in *King* falls well within the realm of legitimate constitutional discourse. Yet Greene's schema does not properly capture and categorize the Justice's arguments. Under the unmodified schema, the logic of Scalia's hierarchy probably would be equated with consequences (or perhaps history) and his discussion of value choices would be regarded exclusively as emotional appeal. This obscures the rationality inherent in Scalia's ordering of liberty above security. Our modified schema permits understanding his value appeal as rooted in *logos* while still recognizing that his argument uses *pathos* to achieve emotional valence and *ethos* to enhance argument authority.

The commonplace nature of Scalia's value appeal in *King* bears emphasis.¹²¹ Weighing the value of solving crime against the value of individual liberty/privacy is a regular task of Fourth Amendment jurisprudence. Advocates can and should make value arguments ani-

¹²¹ I use "commonplace" deliberately here because of its rhetorical origin. The English word is a translation of the Latin *locus communis* or the Greek *koinos topos*. See entry for "commonplace" in *Silva Rhetorica* available at <http://rhetoric.byu.edu>. In short, "commonplace" refers to Aristotle's idea of common topics. Cf. *supra* text accompanying note 63; ARISTOTLE, *supra* note 27, at 157–61, 172–84.

mated by *logos*, *ethos*, and/or *pathos* when urging a particular Fourth Amendment outcome. And judges can and should consider such arguments. To see the situation otherwise—to view value argument as somehow illegitimate or beyond the pale—would impoverish the discourse and prevent its participants from speaking frankly about the true axis of disagreement in the conflict.¹²²

The Fourth Amendment context is hardly the only one that requires honest debate over competing social values. First Amendment jurisprudence involves a similarly fundamental tension between individual freedom and collective interest. Arguments over the proper boundaries of speech or conscience often demand explicit value argument advanced through *logos*, *ethos*, and *pathos*. To illustrate, consider two final examples—one historic, one contemporary.

The historic example concerns a famous pair of cases from the World War II era. Both cases concerned whether public schools could expel students who, for religious reasons, refused to recite the Pledge of Allegiance. Since we have until now focused on dissenting opinions,¹²³ it is worth noting that the opinions analyzed here both state the majority argument.

The Supreme Court decided the first of the two Pledge cases, *Minersville School District v. Gobitis*, in 1940.¹²⁴ Writing for an eight-

¹²² The rhetorical term of art for the axis of disagreement or point of issue in a dispute is *stasis*. See Stephen E. Smith, *Defendant Silence and Rhetorical Stasis*, 46 CONN. L. REV. ONLINE 19, 21 n.1 (2013) (quoting LINDA WOODSON, A HANDBOOK OF MODERN RHETORICAL TERMS 57 (1979) (“[Stasis and status mean] [t]he proposition, or definition, or critical issue to be considered in a piece of discourse.”)). This type of argument differs from a deliberative or epideictic argument. See Smith, *supra*, at 21 n.2 (quoting Antoine Bract, *The Classical Doctrine of Status and the Rhetorical Theory of Argumentation*, 20 PHIL. & RHETORIC, no. 2, 1987, at 79, 81 (“During the preparation of their speeches both parties imagine that they are in the courtroom. . . . [T]hey anticipate their opponent’s arguments and decide on their reaction to them. In this way, they ultimately deduce . . . the crucial question that the judge must answer.”)).

¹²³ The focus on dissenting opinions follows from Greene. His examples of legitimate pathetic argument almost exclusively derive from dissents. Indeed, four of the five primary examples of pathetic argument analyzed by Greene are dissents. See Greene, *supra* note 2, at 1443 tbl.1. The fifth example is not a majority opinion either, but rather a concurrence. *Id.* Though Greene does highlight this connection between *pathos* and dissent, it is important to note. One of the key rhetorical functions of dissents is to advocate for long-term change in the law. For this ambition to work, emotional valence is critical. For my own take on how dissents can change constitutional discourse, see Colin Starger, *Exile on Main Street: Competing Traditions and Due Process Dissent*, 95 MARQ. L. REV. 1293 (2012); Colin Starger, *Expanding Stare Decisis: The Role of Precedent in the Unfolding Dialectic of Brady v. Mayland*, 46 LOY. L.A. L. REV. 75 (2012); Colin Starger, *The Dialectic of Stare Decisis Doctrine*, in PRECEDENT IN THE U.S. SUPREME COURT (C.J. Peters ed., 2014).

¹²⁴ See generally *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940). In *Gobitis*, the school children were Jehovah’s Witnesses. See *id.* at 592 (explaining grounds of their religious objection).

justice majority, Justice Felix Frankfurter upheld the constitutionality of mandatory Pledge recitals despite the obvious First Amendment concerns.¹²⁵ In a key passage, Frankfurter reasoned:

Even if it were assumed that freedom of speech [applies,] . . . the question remains whether school children, like the Gobitis children, must be excused from conduct required of all the other children in the promotion of national cohesion. *We are dealing with an interest inferior to none in the hierarchy of legal values.* National unity is the basis of national security.¹²⁶

Frankfurter concluded that national unity trumped other liberties in this instance because "the ultimate foundation of a free society is the binding tie of a cohesive sentiment."¹²⁷ Without question, Frankfurter's opinion both declared law and weighed competing societal values. Yet, his advocacy proceeded primarily by appeal to *logos* rather than *pathos*.¹²⁸

In *West Virginia State Board of Education v. Barnette*, decided three years later, a majority of the Court reversed *Gobitis* and declared mandatory Pledge recitals unconstitutional.¹²⁹ On behalf of himself and five others, Justice Robert H. Jackson wrote:

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom . . . will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.¹³⁰

In this passage, Jackson mixes *pathos* and *logos*. He acknowledges the case's emotional stakes but appeals to freedom as a matter of both faith and reason.¹³¹

125 *Id.* at 600.

126 *Id.* at 595 (emphasis added).

127 *Id.* at 596.

128 Of course, Frankfurter's opinion did not rely solely on *logos*. At least one famous passage sounds in *ethos*, if not also in *pathos*. See *id.* ("Situations like the present are phases of the profoundest problem confronting a democracy—the problem which Lincoln cast in memorable dilemma: 'Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?' No mere textual reading or logical talisman can solve the dilemma."). By and large, however, Frankfurter's opinion is relentlessly rational.

129 See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that requiring students to state the Pledge of Allegiance is unconstitutional).

130 *Id.* at 641.

131 *Id.* The idea that we should have faith in freedom rather than fear freedom is an essentially emotional appeal to what we know "deep down in our hearts." At the same time, the idea that mandatory patriotism implies weak societal institutions is a logical argument.

The challenge of isolating Jackson's rhetorical mode recurs throughout the opinion. Consider another line, which is among the most celebrated aphorisms in all of constitutional law:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . .¹³²

Is this an appeal based on *logos*, *ethos*, or *pathos*? Arguably, it is all three.¹³³ Though his precise rhetorical mode is hard to pin down,¹³⁴ the *subject* of Jackson's constitutional argument concerns value through and through.¹³⁵

Once more, few would dispute the legitimacy of such canonical statements of constitutional principle. Yet, the fluidity of Jackson's rhetorical mode makes clear that this legitimacy derives from the centrality of value choices to the Pledge debate rather than from recourse to logical, ethical, and/or pathetic appeals. In other words, it is the practical necessity and moral imperative of appealing to emotion when weighing the deep and conflicting First Amendment values of "national unity" versus "freedom of conscience" that render Jackson's rhetoric legitimate.¹³⁶

For our final example of value argument in action, consider the Westboro Baptist Church military funeral case, *Snyder v. Phelps*.¹³⁷ After Westboro members picketed the funeral of Marine Lance Cor-

132 *Id.* at 642.

133 The *pathos* in Jackson's statement is in his clear appeal to our deepest emotional intuitions about "our constitutional constellation." *Id.* His *logos* is rooted in his analysis of the implications of the opposite proposition—that officials can dictate what shall be orthodox. *Id.* Finally, the absence of any external authority for his bold statement shows that Jackson relies on his own *ethos* to advance his argument, which is certainly enhanced by the eloquence of his writing.

134 The difficulty of isolating the precise appeal employed by Jackson thus stands as a vivid demonstration of the multi-faceted nature of many (constitutional) arguments. *Cf. supra* p. 1371 (emphasizing the schematic nature of the grid).

135 In contrast to Frankfurter, Jackson places freedom of individual conscience above "promotion of national cohesion" in the "hierarchy of legal values." *See* *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 595 (1940). Notably, the particular kind of value argument advanced by Jackson here aligns perfectly with Bobbitt's idea of an appeal to the "American ethos." Here Jackson makes an argument about the "national character" of the United States. *See supra* p. 1367 (describing the practical equivalency of Bobbitt's ethical modality with value modality).

136 To use Greene's terms, the legitimacy of Jackson's opinion derives from the fact that it addresses "constitutional subjects." *See* Greene, *supra* note 2, at 1466. According to Greene, *pathos* is more legitimate when "the appeal seeks to persuade the reader of the substance or valence of an established constitutional subject rather than seeking more directly to persuade the reader of a particular adjudicative outcome." *Id.* Freestanding *pathos* arguments lack legitimacy; they need tethering to constitutional *topoi* to be acceptable within the discourse.

137 131 S. Ct. 1207 (2011).

poral Matthew Snyder holding their typical hateful signs (e.g., "Thank God for Dead Soldiers," "Fags Doom Nations," "You're Going to Hell"), Snyder's father successfully sued for Intentional Infliction of Emotional Distress ("IIED") and won a multi-million dollar judgment.¹³⁸ In an 8-1 decision, the Supreme Court affirmed the Fourth Circuit's decision to vacate the judgment on First Amendment grounds.¹³⁹

In a classic solo dissent, Justice Samuel A. Alito harshly condemns the majority's value priorities. The very first line of the opinion sets the tone: "Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case."¹⁴⁰ From there, Alito proceeds:

Petitioner Albert Snyder is . . . simply a parent whose son, Marine Lance Corporal Matthew Snyder, was killed in Iraq. Mr. Snyder wanted what is surely the right of any parent who experiences such an incalculable loss: to bury his son in peace. But . . . the Westboro Baptist Church[] deprived him of that elementary right. They first issued a press release and thus turned Matthew's funeral into a tumultuous media event. They then appeared at the church, approached as closely as they could without trespassing, and launched a malevolent verbal attack on Matthew and his family at a time of acute emotional vulnerability. As a result, Albert Snyder suffered severe and lasting emotional injury. The Court now holds that the First Amendment protected respondents' right to brutalize Mr. Snyder. I cannot agree.¹⁴¹

Alito's *pathos* is palpable here. His prose invites the reader to imagine every parent's worst fear: losing a child, turned into an utter nightmare haunted by malevolent fiends. He literally appeals to emotional vulnerability and condemns the majority for interpreting the First Amendment as condoning such brutality.

One viable interpretation of Alito's *pathos* is that it lends emotional valence to his subsequent First Amendment analysis. On this reading, we can classify his argument under the doctrine-*pathos* modality. At the same time, Alito's argument sounds in value-*logos*. Throughout his dissent, Alito intimates that basic decency requires the First Amendment not protect emotional attacks at funerals. He writes: "At funerals, the emotional well-being of bereaved relatives is particularly vulnerable. . . . Allowing family members to have a few hours of

138 *Id.* at 1213-14.

139 *Id.* at 1219.

140 *Id.* at 1222 (Alito, J., dissenting).

141 *Id.*

peace without harassment does not undermine public debate.”¹⁴² This is a perfectly rational argument about values.

Chief Justice John G. Roberts wrote the *Snyder* majority opinion.¹⁴³ For the most part, he makes by-the-book doctrinal arguments. However, in a move likely designed to counter Alito’s passion, Roberts closes his opinion with a deliberately rational value argument:

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.¹⁴⁴

Here, Roberts acknowledges the emotional stakes and effectively admits that the adjudicative outcome rankles. However, he urges us to accept his conclusion based on a rational value hierarchy—chosen by the Nation—that promotes public debate over public hurtful speech.

Taken together, a rhetorical reading of these opinions helps demonstrate the propositional/non-propositional dynamic described in Part III. The conflict between Alito and Roberts effectively pits a *pathos*-based strategy versus an *ethos*- and *logos*-based one. Of course, both jurists employ all three modes of persuasion in their opinions. Yet Alito clearly leans most heavily on emotion while Roberts makes his strongest appeals to authority and reason. Not coincidentally, Alito’s most persuasive argument concerns the injustice of the ultimate outcome: it seems intuitively right that *Snyder* should win and Westboro should lose. On the other hand, Roberts is more persuasive when defending a general proposition about constitutional meaning: the most rational reading of First Amendment authority seems to be that it protects even hurtful speech on public issues.

It is perhaps reassuring that *logos* and *ethos* appeared to trump *pathos* in *Snyder*.¹⁴⁵ To maintain legitimacy, propositional logic should normally prevail above outcome-driven intuition. However, Alito’s *pathos* nonetheless fundamentally elevated the debate. It gave presence to the deeper value conflict at issue. His *pathos* forced Roberts to justify his conclusion with arguments beyond the doctrinal *topos*.

¹⁴² *Id.* at 1227–28 (Alito, J., dissenting).

¹⁴³ *Snyder*, 131 S. Ct. at 1213.

¹⁴⁴ *Id.* at 1220.

¹⁴⁵ Here it is worth remembering that Roberts spoke for eight members of the Court (with a concurring opinion from Justice Stephen G. Breyer), while Alito dissented alone. *Id.* at 1212. This was apparently not a difficult call for the Court as a matter of reason and authority.

And when Roberts weighed in on the value *topos*, he articulated the constitutional priority of protecting public debate over preventing emotional harm. The debate transcended the usual First Amendment morass of rules and tests and got to the real point of division. Our constitutional discourse ends up the richer because of this rhetorical exchange.

CONCLUSION

The constitutional law and rhetoric project leverages ancient insights to offer a critical perspective on the dynamics of proof in constitutional discourse. Adding a rhetorical dimension to Phillip Bobbitt's enduring typology of constitutional argument types makes great sense. However, a more rigorous theoretical grounding for constitutional law and rhetoric required correcting certain critical flaws in Jamal Greene's new framework.

The first correction pointed to the fundamentally adjudicatory nature of constitutional discourse. Unlike in formal disciplines such as mathematics, disputes in law cannot turn on abstract logical propositions alone. Because of the judgment imperative, non-propositional intuitions about right and wrong sometimes win arguments. This explains the power and inevitability of *pathos* in constitutional argument. It is a point entirely consistent with Greene's argument, and yet is one he failed to make.

The second correction introduced the terms *topoi* and *pisteis* to clarify the key distinction between the subjects of constitutional argument (*topoi*) and the general modes of persuasion (*pisteis*). This taxonomic intervention both reframes Bobbitt's concept of modality and makes the new two-dimensional argument classification scheme more coherent. Coherent classification of argument in turn facilitates understanding of constitutional debates. When Supreme Court Justices disagree over the command of the Constitution, case-specific details often obscure the debate. By abstracting their arguments into a general framework, rigorous rhetorical analysis can reveal the constitutional forest from the trees and identify the true axis of disagreement in a dispute.

As it happens, the true axis of dispute in the Court's most controversial cases often concerns competing values. Therefore, this Article advocated keeping "value" on the list of legitimate subjects of constitutional argument. Not only does this bring Greene's framework into line with those of Bobbitt and Fallon, it also comports with observed practice as demonstrated by examples drawn from Fourth and First Amendment jurisprudence.

Though this Article has argued that value argument deserves a place among the legitimate constitutional *topoi*, it bears emphasis that not all value arguments boast an equal claim to legitimacy. Indeed, constitutional actors often hotly contest the legitimacy of value arguments and hurl accusations of “judicial activism” at each other. Yet this discursive reality is precisely what makes value argument so important to study and understand.

Argument over the legitimacy of considering particular values and emotions in constitutional debate stands at ground zero of a larger struggle over the role of constitutional law in our society. Will constitutional law facilitate liberation and social change or will it uphold stability and social order? Different constitutional actors have proposed different answers to such questions over the course of our checkered constitutional experience. Recognizing value argument as a legitimate *topos* promotes rational, *logos*-based discussion of the hard choices inherent in the Court’s most vexing cases.